IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CRIMINAL APPEAL NO.1232 SB OF 2003

DATE OF DECISION: OCTOBER 30, 2007

Mohinder Kaur @ Mindo

.....Appellant

VERSUS

State of Punjab

....Respondent

CORAM:- HON'BLE MR.JUSTICE RANJIT SINGH

1. Whether Reporters of local papers may be allowed to see the judgement?
2. To be referred to the Reporters or not?
3. Whether the judgment should be reported in the Digest?

PRESENT: Mr. S. S. Rana, Advocate,
for the appellant.

Mr. Shailesh Gupta, DAG, Punjab,
for the State.

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RANJIT SINGH, J.

48 bags of poppy husk, each weighing 35 Kgs. were recovered from an open space on the basis of a secret information received by police party headed by Inspector Harkamalpreet Singh, S.H.O., Police Station, Mahilpur. The secret information received by SHO was to the effect that a man and a woman were sitting on a heap of bags containing poppy husk in Nariala Cho and were waiting for customers. As per the information, if the raid was conducted, then the recovery could be made. SHO Harkamalpreet Singh (PW7), believing this information to be true, proceeded towards the place indicated, after sending a wireless message to DSP, Gharshankar to reach the spot. On reaching the place, PW7 found a lady and a man sitting over a heap of

bags, which was covered with tarpaulin. On enquiry, he learnt that the man was named Chuhar Singh (since dead) son of Mohinder Singh whereas lady was Mohinder Kaur. PW7 apprised the man and woman present there that he suspected the bags to be containing some contraband material and as such, wanted these to be searched. He also apprised them of their right to be searched before a Gazetted Officer or a Magistrate. The accused persons statedly reposed faith in the Investigating Officer and he prepared a consent statement, Ex.PC, in this regard, which was thumb marked by the appellant and signed by late Chuhar Singh. 48 bags were, thus, recovered by removing the tarpaulin and on being weighed, found containing 30 Kgs. in each bag. Investigating Officer put his seal bearing impression `HPS' and took these bags into possession vide memo Ex.PD. The seal after use was handed over to ASI Kapoor Singh. Formal FIR was registered at the police station on a ruqa sent by PW7. It appears that thereafter DSP Amarjit Singh, Ghar Shankar, reached the spot. He apprised the accused persons that samples were to be drawn from the bags recovered from their possession and if desired, the proceedings could be conducted before a Gazetted Officer. The accused having reposed faith in DSP led to preparation of another consent memo Ex.PF. The samples weighing 250 grams of poppy husk from each of the bag were drawn and put into separate parcels. These samples were sealed with the seal bearing impression `AS' by DSP and were handed over to the Investigating Officer. The seal was retained by DSP himself. On a personal search of the accused, a cash amount of Rs.2320/- was recovered from appellant Mohinder Kaur whereas search of Chuhar Singh led

to recovery of Rs.12,240/-. The case property was deposited with seals intact with MHC. These were also produced before Area Magistrate on the next day. The samples were then sent for examination by Chemical Examiner and on completion of formalities, challan was presented against appellant, Mohinder Kaur.

A fact of great significance, which may need notice here is that Chuhar Singh, who was arrested alongwith appellant Mohinder Kaur, died after 3 days of the recovery while still in police custody. The proceedings against him accordingly abated and challan was presented only against appellant Mohinder Kaur. This fact though had a baring on the case, yet has been considered and ignored by the trial Court with a justification which may not sound very proper. Further comments on this would follow.

While being examined under Section 313 Cr.P.C., the appellant not only denied the incriminating evidence appearing against her as led by the prosecution, but raised a plea of her false implication. In support of her plea, she examined Sarpanch Parshotam Singh (DW1), Chetan Agnihotri, Ahlmad of the Court of Area Magistrate besides asking for the presence of Deputy Chemical Examiner for the purpose of cross-examination, pursuant to which one Smt.Shobhita Kumari, Deputy Chemical Examiner, who was examined as third witness for the defence.

The case of the prosecution is supported by the police witnesses whereas the remaining witnesses were given up as unnecessary. The main evidence on which the prosecution would seek reliance would be ofcourse that of Inspector Harkamalpreet Singh (PW7), DSP Amarmjit Singh (PW6) etc.

Learned counsel appearing for the appellant has raised number of pleas in support of the defence case. However, ultimately the counsel stressed and pressed his plea relating to the failure on the part of prosecution to prove conscious possession of the contraband from the appellant besides urging that police witnesses, who alone have come forward to support the prosecution case, would not be worthy of belief in the absence of any independent witness. To substantiate the plea of false implication of the appellant, the counsel would stress that seal after use in this case had remained with the police witness and as such, would render the case of prosecution doubtful in regard to the contraband recovered and the preservation of samples etc. State counsel, however, would urge that prosecution case is fully established from the evidence given by the witnesses who had no reason to falsely implicate the appellant with this huge quantity recovered.

There is not much dispute that this recovery is from an open space. This is as per the evidence given by the prosecution witnesses. Even the secret information was also to the effect that one person and a female were indulging in sale of poppy in the area of cho Nariala. PW7, while deposing about the recovery, stated that he found a man and a woman sitting on the bags covered with tarpaulin. Thus, it is a case of recovery from an open space. Nariala cho is not such a place, which is exclusively accessible to the appellant or her co-accused. PW7, while under cross-examination, clearly stated that bags were not hidden in cho but a tarpaulin was spread over the same. He further stated that these were not visible as the same were lying near the bandh. Evidence of PW7 would also show that when

he reached the spot, he found appellant, Mohinder Kaur and Chuhar Singh sitting on the tarpaulin spread over the bags. They disclosed their names on being arrested and the remaining procedure that he followed. His evidence would also show that after being arrested, both the accused were sent to interrogation Centre at Amritsar. PW7 further disclosed that this was done as per the direction of the senior officer. He, however, could not produce the direction while deposing before the Court. On 10.9.2000, Chuhar Singh died in a Civil Hospital at Hoshiarpur. The evidence would also show that ASI Kapoor Singh had brought the accused from Amritsar to the Court at Hoshiarpur. How a hale and hearty person breathed his last within 3 or 4 days of his presence at interrogation centre definitely required a probe. Neither the police did anything in this regard nor Court took adequate notice of this fact. The trial Court glossed over this aspect by referring that a writ petition is admitted and pending concerning the custodial interrogation, leading to death of Chuhar Singh. It is further observed by the Court that this question is besides the points and has nothing to do with the merits of the present case. In my view, the trial Court is not justified in saying that this had no significance for determining the charge against the appellant. The trial Court failed to realise that the appellant was well within her right to plead that the bags even if proved to be recovered were that of Chuhar Singh, deceased. It was in this context relevant to show that the bags recovered were from a conscious possession of the appellant, which could be done by ruling out the possibility of these being in the ownership and possession of the deceased Chuhar Singh. This question, as such, could not have been ignored, as has been done

by the trial Court. Since the contraband was concededly recovered while appellant as well as Chuhar Singh were found sitting over these bags, the prosecution was under obligation to prove the fact that these were in conscious possession of the appellant as well as deceased Chuhar Singh. Since the case against Chuhar Singh has abated, it was more essential for them to prove that these bags were not or could not be in exclusive possession of Chuhar Singh and that the appellant was not innocently present at the scene or at the time of recovery.

The case set up by the prosecution is that the appellant as well as her co-accused were arrested at the spot. What for they were required to be sent for interrogation to Amritsar? In fact, both the accused were produced before the Ilaqa Magistrate on 6.9.2000 and were remained to police custody for 3 days. They, however, were not produced on 9.9.2000 as Chuhar Singh was admitted in Civil Hospital. ASI Kapoor Singh (PW5) had to concede that Mohinder Kaur and Chuhar Singh were brought from Interrogation Centre, Amritsar, directly to the Civil Hospital, Hoshiarpur. The doctor required Chuhar Singh to be admitted in the hospital, which was not done by PW5 by saying that he was required to be produced before a Magistrate. He was statedly given some injection and then taken to District Court at about 4.15 PM. Still, he was not produced before the Magistrate. Efforts appear to have been made to produce Chuhar Singh at the residence of Magistrate, Sh.R.K.Gupta, which was again not done and ultimately he was admitted in the hospital at about 5.30 P.M. The efforts, on the part of the police to cover this serious illegality committed by them is well reflected from the version

given by PW5. It runs as under:-

> "It is a fact that I took Mohinder Kaur to the residence of learned Sessions Judge, but he was not available, on 9.9.2K. I then appeared before Sh. CD Gupta, learned ASJ, Hoshiarpur at his residence and he asked me to appear before the duty Magistrate. Mr.S.P Singh was the duty magistrate on that day and he was also not available at his residence. It is a fact that Shri GK Rai was the Special Judge in those days. I also went to the residence of Mr.GK Rai, Special Judge, and he deputed Sh.R.K Gupta, to attend the remand application. I went to the residence of Mr. RK Gupta, and to inform him that he was put on duty by Special Judge, to attend the remand work of this case and Mohinder Kaur was kept by me outside his residence. It is a fact that Mr.R.K Gupta, visited the Hospital, Hoshiarpur and at 8.00 PM on that evening. I do not know if Chuhar Singh was serious at that time or not when Magistrate Mr. RK Gupta visited the hospital. It is a fact that JMIC, Mr. RK Gupta, gave judicial remand of Chuhar Singh and Mohinder Kaur on 9.9.2K, in CH Hoshiarpur upto 20.9.2000. It is a fact that Chuhar Singh died in the Hospital at 12.10 AM midnight on 10.9.2000. I did not send any intimation to Mr.R.K Gupta, JMIC, regarding the death of ChuharSingh, as I was not present there. I came to know about the death of Chuhar Singh at about 2.00 AM on 10.9.2000. It is correct that an enquiry was marked regarding the death of Chuhar Singh to SDM

Garhshankar. My statement was recorded there."

It is not clear what is the outcome of this enquiry, which statedly was conducted by Sub Divisional Magistrate, Ghar Shankar. It is not difficult to imagine that the S.D.M. would have also tried to shield the errant police officials who were so unconcerned about the life of a human being. How a person in good health lost life within 2/3 days of arrest can not be ignored. Manner of interrogation obviously is responsible for this death. Outcome of the enquiry or the fate of writ petition is not known. The aspect of of death is not completely irrelevant for this trial. Not out of curiosity but due to concern for a human life, the Court would like to know the outcome of the enquiry and that of the writ petition. Decision in the present appeal need not pend for this reason and further action can separately follow on this. State counsel would place on record the necessary information in this regard.

It may also need a mention that the aspect of false implication of the appellant can not be easily ignored in this context. The manner in which accused have been shown to be sitting over the bags at the middle of night in an open space would not inspire confidence. Why and for what they were sitting over the bags at the middle of night would not have any explanation. Obviously, they could not be expected to sell the poppy husk at middle of night. From where these bags were brought and unloaded was not investigated at all. Why would the appellant or her co-accused unload these bags in an open space and covered them with tarpaulin and then sit over it? Any person with little intelligence would have unloaded these bags at some secret place away from public view at least. One would

be fool to unload these at open place and then resort to sale of the same. Though not pleaded in that sense, it would sound more probable to say that these bags apparently were recovered by the police and investigation may have brought to surface the involvement of the appellant and her co-accused, Chuhar Singh. That would explain the reason for which they were sent for interrogation to Centre at Amritsar after their arrest. The defence of the appellant is that she was brought by the police from her house and was falsely implicated in this case. Defence would also refer to the statement of DW1 showing that he was informed that Chuhar Singh and the appellant had been lifted by the police officials from their houses.

Even if the aspect of defence projected by the appellant is kept aside, the fact that prosecution was under an obligation to show conscious possession of the appellant before it could ask for her conviction can not be ignored. Mere presence of the appellant, even if she was found sitting on the bags at middle of night, would not be in itself enough to show or prove her conscious possession over the contraband. This question is required to be determined.

In support of his submission, counsel for the appellant has referred to ***State of Punjab Vs. Balkar Singh and another,*** 2004 Supreme Court Cases (Cri.) 838. This was a case where the State has filed appeal before the Hon'ble Supreme Court against the acquittal of two accused persons on the ground that the accused were proved to be in conscious possession of contraband and had been wrongly acquitted by the High Court on that count. The accused in this case were found sitting on the bags of poppy husk; the recovery was effected from a field and the accused persons

belonged to different villages. The presence of the accused persons at the place from where bags of poppy husk were recovered itself was taken as evidence of possession of accused persons over these bags by the police. While up-holding the acquittal of the appellants, the Hon'ble Supreme Court observed that "**the presence of the respondents at the place from where the bags of poppy husk were recovered itself was taken as possession of these bags by the police. In fairness, the police should have conducted further investigation to prove that these accused were really in possession of these articles. The failure to give any satisfactory explanation by the accused for being present on that place itself does not prove that they were in possession of these articles. The failure to give any satisfactory explanation by the accused for being present on that place itself does not prove that they were in possession of these articles. Though the respondents raised a plea before the Sessions Court, the same was not considered by the Sessions Judge in the manner in which it should have been considered. We do not think that the High Court erred in holding that there was no evidence to prove that the respondents were in conscious possession of the poppy husk recovered by the police. The prosecution failed to discharge its obligation to prove the possession of the poppy husk by the respondent."**

Similar is the situation in the present case. Mere presence of the appellant at the place of recovery is being advanced by the prosecution to allege that the contraband was in her conscious

possession. The prosecution has not been able to explain how the contraband was in exclusive possession of the appellant. The prosecution was also required to rule out the possibility of it being not in possession of Chuhar Singh, co-accused. The recovery is from an open space, which is accessible to every one and certainly not exclusively to the appellant or her co-accused. In my view, the ratio in Balkar Singh's case (supra) referred to above would fully apply to the facts of this case. This view has been followed by this Court in number of judgments referred to by counsel for the appellant. In this context, he would refer to ***Sukhdev Singh alias Sukha Vs. State of Punjab,*** 2006 (1) RCR (Criminal) 4. This was also a case where accused was sitting over the bags. The Division Bench of this Court held that it does not prove that the accused was in conscious possession of the bags. The Court further held that the police should have conducted further investigation to prove that the accused was really in possession of these bags and that any failure to give any explanation for being present at the place itself does not prove that person was in possession of these articles. Reference can also be made to the case of ***Bikkar Singh Vs. State of Punjab,*** 2006(3) RCR (Criminal) 16, where recovery of 120 bags of poppy husk was from a sugarcane field. In this case also, the accused persons were also found sitting on the bags. This was not held to be a proof of custody and control of the accused over the substance beyond reasonable doubt. Even in ***Avtar Singh Vs. State of Punjab,*** AIR 2002 SC 3343, it was observed by the Hon'ble Supreme Court that though the persons were found sitting on the bags, but this alone would not be sufficient proof for they being in conscious possession

of the contraband as the possibility of the appellants being labourers of the truck for loading and unloading can not be ruled out. The case of ***Megh Singh Vs. State of Punjab,*** 2003 Cri.L.J. 4329 relied upon by counsel for the State would not be applicable to the facts of the present case. Here the prosecution has not been able to rule out the possibility of innocence presence of the appellant and also of the possibility that the contraband was belonging to Chuhar Singh, who is no more, basically because of the highhandedness of the police. The ratio as laid down by Hon'ble Supreme Court in the case of Balkar Singh (supra) is clearly attracted to the facts of the present case. Similar is the ratio culled out in the cases of Sukhdev Singh and Bikkar Singh (supra).

Another factor that will create dent in the prosecution case is that seal, after use, was kept by the police official. The grouse is also raised that the search of the appellant, who was a lady, was not conducted by a lady constable or even if subsequently called, was not examined by the prosecution. This would indicate the violation of Section 50(4) of the Act. In case of ***Gejo Vs. Punjab State***, 1999(1) RCR 559, this Court doubted the prosecution story on account of non-examination of lady constable in whose presence the search was conducted, finding it to be fatal to the case. Though no contraband was recovered from the personal search of the appellant but her personal search when conducted led to recovery of some cash, which was bound to be in the presence of a lady constable, who has not been examined.

It also sound strange to observe that the contraband was first taken in possession by PW7 before the arrival of DSP, who was

the Gazetted Officer. It was also sealed before the arrival of DSP. The DSP, on his arrival subsequently, opened the seals and took the samples from the bags, which he sealed with his own seal. Yet both the seals were kept by the police officials. The possibility of the samples being tampered with as such, can not be ruled out. This Court in number of judgments has viewed this aspect with suspicion which would go to cast a doubt on the prosecution story. This Court in ***Baldev Singh Vs. State of Punjab,*** 2005 (1) RCR (Criminal) 823 has held that till the case property is despatched to the office of Forensic Science Laboratory, these seals should not be available to prosecuting agency and in the absence of such safeguard, the possibility of the seal being tampered with, substance being changed and the container being re-sealed can not be ruled out. In this very case only, this Court also took the view that mere presence of the accused person and sitting over the bags would not establish that the bags belonged to him. In case of ***Ramji Singh Vs. State of Haryana,*** 2007(3) RCR (Criminal) 452, again this Court took a view that where the seal is not given to independent witness who remained with police and the samples are sent after a delay of 72 hours, then such circumstance is fatal to the prosecution. Similarly in the case of ***Fateh Singh Vs. State of Haryana,*** 2006 (2) RCR (Criminal) 762, this Court has held that where the seal used for the purpose of sealing the case property remains throughout with the police official who was working under the Investigating Officer, then the possibility of seal being tampered with and substance being changed and packed containing the samples being re-sealed can not be ruled out. This aspect would add to the infirmities that are

noticeable in this case. All these go to cast a doubt on the whole prosecution case. Benefit of this doubt is to go to the appellant. The prosecution, thus, failed to bring home the charge against the appellant with requisite assurance needed to base conviction in a criminal case. The appeal deserves to be allowed. Ordered accordingly. The conviction and sentence awarded to the appellant is, therefore, set-aside. The bail bonds and surety bonds, if any furnished in the trial Court, shall stand discharged.

Let notice issue to Advocate General, Punjab, to place on record the outcome of the enquiry in regard to death of Chuhar Singh and the fate of writ petition, if it has been decided. Advocate General would also intimate, if any one has been held responsible for this death and action, if any, which may have been taken against the person so held responsible. Let this be done by January 15, 2008, on which date this case be put up for hearing for this purpose only.

October 30 ,2007 **(RANJIT SINGH)**
khurmi **JUDGE**